

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1732593

MEMBER: Michael Judd

DATE AND TIME OF ORAL DECISION AND REASONS: 29 October 2019 at 9:50 am (WA time)

DATE OF WRITTEN RECORD: 5 December 2019

PLACE OF DECISION: Perth

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.221(1) of Schedule 2 to the Regulations

Statement made on 05 December 2019 at 11:06am

CATCHWORDS

1. *MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine de facto relationship – criteria at time of decision – continuing spousal relationship – financial aspects – sharing of household expenses – care of stepchildren – joint social activities – decision under review remitted*
- 2.

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cl 820.221

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

APPLICATION FOR REVIEW

ORAL DECISION OF MEMBER JUDD

[9.45 am]

MEMBER: This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a partner temporary class UK visa under section 65 of the Migration Act. The applicant applied for the visa on 10 October 2016 on the basis of his relationship with his sponsor. At that time class UK contained one subclass, subclass 820 Partner. The criteria for the grant of this visa are set out in 820 of schedule 2 to the Migration Regulations.

On 19 December 2017, the delegate refused to grant the visa on the basis that the visa applicant could not satisfy clause 820.221(1). The tribunal has read the decision several times and it seems that the following is a summary of those reasons: it seems that at the time of application the delegate was satisfied that there had been sufficient evidence either that the applicant and sponsor were in a de-facto relationship at time of application, as defined by section CB. The delegate was satisfied that the applicant met clause 820.211(2) at time of application.

The delegate had to consider the criteria at time of decision. On 15 November 2017, the department contacted the applicant to provide documentation in relation to the application and to provide additional information including evidence that he continued to be the spouse or the de-facto partner of the sponsor, an Australian permanent resident or eligible New Zealand citizen. The applicant provided [Bank 1] statement documents in joint names for the two September 2016 to 2017 and [Bank 2] statements in the sponsor's name for the period 11 October 2016 to 3 November 2017. The delegate made an assessment of the financial aspects of the relationship and overall was not satisfied that the parties had pooled their financial resources in any way; that they had significant joint assets or liabilities; or made any significant joint purchases or that they share day-to-day financial expenses.

The delegate then looked at the nature of the household and considered such things as domestic living arrangements, shared living spaces and daily routine. The delegate considered that, as the applicant and sponsor had not provided further documentary evidence that they are continuing to live together, the delegate was not satisfied that they continued to establish and operate a joint household.

In relation to the social aspects, the parties, or the applicant rather, had not provided further documentary evidence regarding the social aspects and that they continued to represent themselves as a de-facto couple to friends, family, or the wider community, nor had they undertaken planned or joint social activities.

As required, the delegate looked at the nature of the persons' commitment and noted they had not provided further information regarding the mutual commitment aspect.

So, in conclusion, the delegate was of the view that it was acknowledged they had resided at the same address at one point in time and had shared the joint responsibilities, but the delegate assessed all of the evidence and was not satisfied this continued to be the case at time of decision.

So, in brief terms, they were the reasons. The applicant appeared before the tribunal on 3 September 2019 to give evidence and to present arguments. The tribunal also received oral

evidence from his wife, being his sponsor, [Ms A]. The applicant was represented in relation to the review by his registered migration agent, [Ms B], being a lawyer and migration agent.

The tribunal notes that the delegate was satisfied, as I have said, that at the time of application on 10 October 2016 the applicant and his spouse were then in a de-facto relationship as defined by section 5CB and that he met clause 820.211(2) as at time of application.

So it would seem that in the present situation it is whether at the time of tribunal decision that the applicant continues to be the spouse of the sponsoring partner. The tribunal notes it is now three years post-application, the application date being 10 October 2016. It is two years post date of delegate's decision.

Having considered the matters then before the delegate, the tribunal is also satisfied by the findings of the delegate that at the time of the visa application the applicant was then the de-facto spouse of an Australian citizen and is now his wife. The issue is what is the position up to and at the time of this decision.

The word "spouse" is defined in section 5F of the Act, which provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act. There must be mutual commitment to a shared life as a married couple to the exclusion of all others. The relationship must be continuing and the couple must live together or not live separately and apart on a permanent basis. The reference is section 5F(2)(a) to (d) of the Act.

In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects, the nature of the parties' household and their commitment to each other as set out in regulation 1.15A3. Each of these specific matters in that regulation are questions that the tribunal must answer.

The tribunal accepts that the parties were married to each other, or are married to each other rather, under a marriage that is valid for the purposes of the Act as required by Section 5F(2)(a). The issue is, are the other requirements for a spouse relationship met?

Before I go into all that, the tribunal makes the observation that it is in an arguably better position than perhaps the department delegate was in relation to assessing this matter simply by reason of the ability to receive evidence from the applicant and the sponsor in person. That has enabled assessments to be made as to credibility.

I want to spend some time, and I know there was a lot of documents provided, but setting out what I would consider to be the key documents in assessing this particular matter.

The tribunal has had the benefit of receiving submissions dated 16 September 2019, which have been thoroughly considered. There have been many photographs of the parties submitted to the tribunal, I do not intend to go to them in any particular detail, but they do show the parties together in various social and domestic settings, occasionally with what appear to be family or friends, and also with two children who the tribunal accepts are the children of the sponsor.

I have a letter from [a named] Childcare Centre of 8 March 2018 from [Ms C], a statutory declaration of [Mr D], certificates of achievement in relation to a [business] on 15 October 2017, photos of the applicant with what appears to be the son of the sponsor and also the daughter of the sponsor, the application for migration to Australia, accommodation,

confirmation of accommodation on a bushman's ride, 6 July 2018, where it appears that both parties had a weekend riding together.

There are records from the Criminal Records Database from Estonia showing no records or no punishments for the visa applicant, a National Police Certificate for the visa applicant. There is the marriage certificate indicating the date of the marriage was Australia Day, 26 January 2018, marriage occurred at [specified place] in [Suburb 1], Western Australia. That confirmed that the sponsor had divorced [in] February 2017.

There are various documents in relation to overseas travel, which have been considered, wedding classes and so forth, a certificate of guarantee in relation to some jewellery that was purchased, appears to be retired on 8 May 2016. Confirmation of intention to get married from the marriage office. Two statements, one from the visa applicant and one from the sponsor. A copy of the most recent wills for both applicant and sponsor, which indicate that each are the primary beneficiaries. A copy of a life insurance policy for the sponsor dated 15 August last year, which confirms that her husband is beneficiary to the percentage of 30 per cent and her two children the other in equal shares. There is a document of 14 January 2019 from [a Strata Management company] in relation to the property at [Address 1]. It appears to relate to the strata management.

In particular, the tribunal has carefully considered a range of records, including the records for the visa applicant, 19 September 2014 to 31 December that year, 1 July 2015 to 31 December 2015 in his name, 1 January 2016 to 30 June 2016 in his name, [Bank 2] record. Again, 1 July 2016 to 31 December 2016 in the applicant's name. 1 January 2017 to 30 June 2017. [Bank 1] bank records for a joint account for the period 1 September 2017 to 16 November 2017. Same account, 31 August 2018 to 16 January 2018. Document from [a settlement agent] regarding the purchase of [a property at Address 1]; that is in joint names. A copy of the certificate of title for the property in both names. Contract for the sale of land in relation to that purchase signed by both. Winter Energy bill.

Bank records in relation to the sponsor dating back to July 2017 to 30 December 2017. Same bank records for the sponsor, July 2016 to 30 December 2016. The same again, 31 December 2016 to 30 June 2017. Same account, 31 December 2015 to 30 June 2016. It appears to be the same account, 25 September 2015 to 30 December 2015. Same account, 31 December 2014 to 30 June 2015.

There is an application for auto finance to [a lease company] that is in the name of the sponsor in which the applicant is endorsed as being a referee by the looks of it. There is a document from [real estate agent] in [Suburb 2] dated 13 February 2018 in relation to the prior property. That is also in joint names. That was the previous rental property that they were leasing. RAC Horizons magazine cover, both names. Statutory declaration of [Ms E] (?), 27 September 2016. Statutory declaration of [Ms F](?), 29 September 2016. The power or electricity account, bills, in the name of the applicant in relation to 2016.

A variation of as security bond dated 17 September 2016 in both names in relation to the rented premises of [Address 2], start date of tenancy was 6 October 2015.

The tribunal received evidence from both parties, initially from the visa applicant, and he said that he at the time of hearing was [age] years of age and he had lived his whole childhood in Estonia. He went to university between 2007 and 2013, studying [Discipline 1], he did not complete that study, and that was because he did not have sufficient money. He said that his mother is still alive and living in Estonia in [City 1]. His brother and sister are still living in Estonia. He was [age] when he came to Australia, arriving on his own. He had been a

[Occupation 1] in Estonia in mainly [specified industry]. He came on a working holiday visa for a one-year period. He had never married before.

He said that he had met his wife, his sponsor, in October 2014. She had been running her own [business] at the time. He had been looking on [social media] for a Russian [Occupation 2] and he decided when he met her he liked her and he became aware that she was married. He learned that she had troubles at home. He found out that they shared a joint interest in [hobby] and she had been interested in [hobby] from her time in Russia from 2012. She had a [Brand 1 chattel]. He had a [Brand 2] and he bought that [chattel] to socialise, he bought the [chattel] around the beginning of 2015.

Very quickly, a romantic connection developed between the two and by March 2015 it became serious. He became aware that his sponsor had been experiencing problems in her marriage even before leaving. He believed she came to Australia in 2013, 10 months before he did. She had two children, one boy, the eldest, was born in Russia and the youngest, a girl, was born in Australia. Her ex-husband is still living in Perth.

He then outlined how it came to be that they first cohabited at [Address 2]. They had moved in together on about 6 October 2015 and the lease was in both names. They paid \$480 per week initially but, for whatever reason, that was reduced down to about \$380 per week. They lived at those premises from October 2015 to December 2018. He was working during that entire period, self-employed, and that was usually involved in [Industry 1]. He was usually involved in [specified work].

In this period, his wife, the sponsor, was working as a [Occupation 2] at the [Address 2] house. He said that it was mostly his account that had been used for the paying of the joint rent. He said that emails regarding bills were mostly coming to his email. The joint account had been set up in 2016 as a joint effort to save money for a deposit on a house, which was subsequently purchased in December 2018. The money that has been deposited into the joint account has come from both of them. It has been deposited electronically from both parties. The joint account is used for petrol, sometimes for food and sometimes to save money.

The house they live in at the moment is a three-bedroom house, which had been bought established. They obtained the loan, the amount of about \$363,000, from [Bank 2] and they are paying \$1,336 per month.

He said that the money to pay off the [Bank 2] mortgage comes from his wife's account and that he deposits money into that account to enable the mortgage to be paid. He deposits money a couple of times per month. He confirmed, and the tribunal accepts, that both names are on the certificate of title. He confirmed that the two children both live at the house but they see their father three days per week. The children were aged [age] and [age] at time of hearing, both were at school. He said that they have plans for them to have more children eventually.

The tribunal enquired as to his income and he said that after tax he receives about \$50,000 per year and the sponsor a similar amount of about \$45,000 per year.

He said that, in order to afford the deposit, they had sold many assets, including the [chattels]. The deposit for the house was an amount of about \$33,000. He acknowledged that his wife does the majority of the cooking but that he cooks things such as pasta and hash browns. Initially he accepted that it was difficult to get to know the two children but now they both refer to him by his first name and he considers himself to now be their stepfather. He outlined circumstances where he had taken the children surfing and that had been arranged through a friend. He was involved in dropping off the children at [classes]. He said

the children love to play with him but he does observe some discipline, mostly about study. The tribunal understood that evidence mainly referred to the eldest.

He confirmed that his wife is Australian. In relation to housework, he does the bathroom cleaning, the showers, the garage and the shed and sometimes the kitchen. His wife, the sponsor, mostly does the rest of the housework.

The tribunal enquired about what social activities they do together as a couple. He outlined some holidays that they had participated in, one was to [Destination 1](?) and also to [Destination 2] where they had taken both children.

He had indicated that he had not returned to Estonia since arriving into Australia. His wife had been back to Russia on many occasions. He described himself as not being particularly religious or spiritual but that he was baptised Christian.

He also outlined there was an Italian restaurant in [Suburb 2], which they both enjoyed attending together. Sometimes they'd go together as a couple alone and sometimes they'd take the two children. He said his wife likes to try out new food. He said that initially they had had a lot of difficulties, particularly in relation to the visa situation and also the purchase of a first home in relation to securing the mortgage. He believes that they now both understand each other much better.

The tribunal enquired as to whether the couple have any plans and the first plan is to obtain a visa and that he wants to finish off his study and find a full-time job and that one day he hopes they will be able to afford to buy a bigger house.

The tribunal enquired as to whether any members of his family had travelled to Australia to see him and he said that his mother was afraid of flying and she would not be visiting. No other family had been to Australia. He described himself as only really having one major friend but his wife has many friends.

He said that they had been living together nearly four years and provided a great deal of emotional support to each other. He gave an example, about two years ago his grandfather had died and that he had become very depressed and had been supported during that period of time by his wife. He said that his wife has tried opening him up to new experiences.

The tribunal took some brief evidence from the sponsor. She confirmed much of what the applicant had told the tribunal. She had arrived in 2013, she confirmed that the father of the two children see them three days a week and described herself as being similar in many ways to her second husband and that he makes her laugh. She confirmed the date that they had moved in as being 6 October 2015. She confirmed that they had never separated in that four-year period up to time of decision.

She corroborated much of what the applicant had told the tribunal in relation to the sharing of housekeeping. She confirmed that the applicant does share in the transport for her two children and she also confirmed that the two children call her husband by his first name. She confirmed that her husband is coaching her son mathematics but also how to become stronger physically as a young man. She believes that, compared to her earlier relationship, she can relax a little bit and her children are now happy, her son is now more relaxed.

She also confirmed that the applicant drops off her son to play [sport] and her daughter to [lessons]. She confirmed the income and that corroborates fairly closely the evidence of the applicant. The tribunal enquired as to who has responsibility for paying bills, irrespective of

what account is being used, and her answer was that it depended on who has the money at that particular time.

The tribunal received some information informally from the [age]-year-old son and notes that he had said words to the effect of he needs the applicant around.

So that was, in totality, all of the evidence that was received. The tribunal has looked at the financial aspects of the relationship, including joint ownership of assets, joint liabilities, pooling financial resources, legal obligations, and sharing of expenses. It is satisfied that there is a significant degree of sharing of household expenses and there had been up until December of last year a sharing of responsibilities for the paying of rent for the first premises.

The tribunal is satisfied that the applicant is considered between the two to be the primary breadwinner or earner in relation to the relationship. That income is supplemented by the sponsor's work as a [Occupation 2] operating from their home. So the tribunal is satisfied that there is co-operation between the two to manage their financial responsibilities. It notes that they are beneficiaries under each other's wills and that the applicant is a co-beneficiary of the sponsor's life insurance policy with [insurer] along with the two children.

The tribunal accepts that the applicant has taken on a role in the care and discipline of the sponsor's two children but perhaps more particularly in relation to the son, the female child being somewhat younger at this stage.

The tribunal finds that the sponsor maintains the primary role for the upkeep of the house and the housework but that is supplemented to some degree at least by a small amount of maintenance, gardening and cooking occasionally. It's accepted that they do their shopping together.

The tribunal has considered the social aspects of the relationship. It has sighted several statutory declarations from friends and has taken into consideration many, many photos of the couple in a variety of social and domestic settings, including with the children and also with their friends. It accepts that they have undertaken recreational or holiday activities as a family. It notes that they perhaps courageously decided to do a parachute jump together on 15 October 2017, which appears to have been a gift from one to the other. There has been a degree of holiday travel overseas undertaken by both.

The tribunal has also looked carefully at the nature of the persons' commitment to each other, including the duration of the relationship, the length of time they've lived together, the degree of companionship and emotional support they draw from each other and whether they see the relationship as long term. The tribunal notes that they met on or about 18 October 2014 at the sponsor's then [business]. They have now known each other for just over five years, initially as friends, as the sponsor was then in a marriage, but that relationship developed over time.

About a year later, on 6 October 2015, they commenced cohabitation. The applicant applied for the partner visa on 10 October 2016. There was no information or evidence, including from any confidential source, of there having been a separation of the parties since October 2015. There is no evidence before the tribunal that the relationship has been created to enable the visa applicant to remain in Australia. The tribunal notes the rental agreement for [property at Address 2], being the initial lease, and then there were two extensions in joint names.

It also notes that the intention to get married, although the marriage occurred on Australia Day last year, but the intention to get married was made known on 18 May 2016 to the

celebrant. So the tribunal can accept that as early as May 2016 there had been a joint acknowledgement of the intention to marry.

The tribunal notes that the sponsor has taken on the surname of the applicant. Significant weight should be placed upon the purchase of a significant asset, which is the house, and the subsequent or consequent joint home loan entered into on 26 November 2018 regarding [property at Address 1]. That is a significant commitment between two people.

The tribunal has given careful consideration to the financial records and particularly the joint account and accepts that it has been managed in such a way that there is co-operation between the two for their joint benefit. That said, the tribunal must always look carefully at financial records because there can be situations where two people have separate accounts but they are not created in a joint fashion. There are many bills that are in both names. There are also separate bills that are settled jointly between them, which include water, electricity and Council rates. It is accepted that the applicant does provide money for the upkeep of the sponsor's two children and that he does assist in transporting children to their schools and their out-of-school activities, and also he does assist in the children's homework.

There has been a degree of care and emotional support offered by the applicant to the sponsor and that has been reciprocated between the two. It is also noted that the applicant is listed as an emergency contact for the two children as evidenced by the [named] Childcare Centre letter of 8 March 2018.

So the tribunal weighs up all of those matters, which it has found, and it must go on to consider whether there is a mutual commitment to a shared life to the exclusion of others, a genuine and continuing relationship, and whether they live together or not separately and apart on a permanent basis. The evidence is clear that they have lived together for about four years. There is no evidence that either has left the relationship physically or emotionally in that period of time. There is no evidence that either has or is having any relationship with any other persons.

The tribunal does accept that there is a commitment to shared life to the exclusion of others and it does accept that the relationship is genuine and a continuing relationship. So on the basis of all of those findings, having considered all of the documents and information and the evidence given at the tribunal, the tribunal is satisfied that the requirements of section 5F(2) are met. It does accept the delegate's findings as at time of visa application and it finds that these requirements are met at time of this tribunal's decision. Therefore the applicant does meet clause 820.211 of the Act.

Given those findings, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a subclass 820 visa. The decision is that the tribunal remits the application for a partner temporary class UK visa with a direction that the applicant meets the requisite criteria. So that is the decision.

END OF ORAL DECISION

[10.29 am]

Michael Judd
Member